

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

22 Cr. 240 (AKH)

5 SUNG KOOK (BILL) HWANG, et al,

6
7 Defendants.

8 Oral Argument

9 -----x

10 New York, N.Y.
March 21, 2023
2:30 p.m.

11
12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 District Judge

15 APPEARANCES

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Southern District of New York

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(Case called; appearances noted)

THE COURT: Let's start with the motion to dismiss, and I guess you're going to be arguing, right, Mr. Lustberg?

MR. LUSTBERG: I'll be arguing. I'm not sure all the issues that your Honor is interested in, but I'll be arguing in regard to manipulation, *Rico*, and the government misconduct motions, so happy to do it. Mr. Valen will argue with regard to the securities fraud and mail fraud issues.

THE COURT: As you wish. Go ahead.

MR. LUSTBERG: Does the court wish them in any particular order?

THE COURT: You take it, Mr. Lustberg, and I'll interrupt you.

MR. LUSTBERG: Okay. Thank you, Judge. So, your Honor, today before this Court are significant substantive issues, which respectfully could really forever influence whether and how trading in securities can be prosecuted. And there are also significant procedural issues about how persons under investigation can and should be treated going to the obligations of federal prosecutors to be candid and fair.

THE COURT: Let's leave that for later. Let's do the substantive issue first.

MR. LUSTBERG: You got it. Thank you, your Honor. I'm going to start, your Honor, with the question of manipulation. The question of whether the government adequately

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1 alleges securities fraud in terms of manipulation is a purely
2 legal question, and that question is, Is it illegal, and can it
3 be criminal to engage in real sales if the intent of doing so
4 is to affect the price of securities. Assuming for purposes of
5 this discussion that there is such intent, which of course we
6 have to do for purposes of this motion practice.

7 First, under both Section 10(b) and Section 9(a)(2),
8 the Supreme Court has made absolutely clear that
9 manipulation -- to quote the Court, connotes intentional or
10 willful conduct designed to deceive or defraud investors by
11 controlling or artificial affecting the price of securities.
12 That is, your Honor, it requires misleading practices,
13 practices that -- again quoting, artificially affect the
14 securities price in a deceptive matter. That is, that are
15 aimed at deceiving investors as to how other market
16 participants have valued a security. That is the standard.

17 And this occurs, your Honor, under the case law when a
18 transaction sends a false pricing signal to the market. That's
19 what the Second Circuit said in the *ATSI*, which I call *ATSI*
20 case. Which in turn requires some deceptive conduct that
21 results in the market receiving false information. That is,
22 that the defendant conveyed some sort of false impression to
23 the marketplace. At bottom as with all fraud, what is required
24 is a misrepresentation, an act of deception -- in the words of
25 the United States Supreme Court in the *Schreiber* case. In its

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1 decision in *Mulheren*, the Second Circuit stated that it
2 harbored doubt -- that its words -- as to whether it was
3 sufficient for a manipulation conviction that the purchase was
4 for the sole purpose of raising the price, rather than for
5 investment purposes.

6 The Court didn't reach that question there because
7 there was no proof that there had been, that that had been the
8 sole purpose as to what occurred, and it pointed out that it
9 was not enough that the defendant in that case, like the
10 defendant here, engaged in high volume trading; but did so
11 there in a way that concealed its trading.

12 THE COURT: The indictment alleges, among many other
13 things, that the effect of the swaps was to avoid disclosure
14 that would be required under Section 13(d) if more than 5
15 percent ownership of stock was obtained, was held. And it
16 alleges that through the particular swaps and the effect of the
17 swaps, particular to Mr. Hwang, that a great deal more control
18 was exercised by Mr. Hwang and his company without telling
19 anybody. So that the obtained positions that controlled a
20 significant percentage of the float, someone who wanted to buy
21 or sell would really want to know how much of a float there was
22 because it has a lot to do with the liquidity of the stock and
23 the free play of the market. Wouldn't you say that's an
24 adequate allegation of manipulation?

25 MR. LUSTBERG: Respectfully, your Honor, no, it isn't,

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1 and here's why. Just like many other of the allegations -- and
2 your Honor has said there were a number of allegation in this
3 indictment. The allegations regarding swaps go directly to
4 what is and is not lawful. That is that there's no question,
5 but that Mr. Hwang's swaps trading did not have to be disclosed
6 in the way that it would if it were actual securities. That
7 is, that's the effect of swaps, is that one does not have to
8 make the disclosures -- and by the way in his case, there's the
9 additional protection against disclosure that comes about
10 because he's working from a family office, which you've kind of
11 alluded to. But the truth is that his --

12 THE COURT: I don't think that makes a difference.
13 We're not talking about the Investment Advisers Act. We're
14 talking about manipulation.

15 MR. LUSTBERG: I understand. So the question you've
16 asked is whether he concealed his -- he somehow concealed his
17 investments in a way that deceived the market. Leaving aside
18 that everyone --

19 THE COURT: That's what's alleged.

20 MR. LUSTBERG: That's what's alleged. He didn't
21 because his actions in disclosing or non-disclosing were in
22 precise conformity with the law. It's interesting. Your
23 question is an interesting public policy question which as
24 you've seen is being debated at the SEC and in Washington as to
25 whether the statute should be changed to require a greater

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1 disclosure in situations where swaps are involved.

2 THE COURT: It will not be the first time that an
3 issue of fraud was also a subject of discussion whether or not
4 to issue a policy position.

5 I recall a case decided by Judge Friendly, who I think
6 very few people in this room will recognize -- but you and I
7 will.

8 MS. MULLIGAN: Thank you, your Honor.

9 THE COURT: -- with accountants, accountants fraud
10 where the accountants defense was that they did everything that
11 was permissible, but where the effect of what they did and the
12 intent of what they did was to have a material
13 misrepresentation of the books and records, and that was
14 considered a fraud.

15 And the question here is, Can acts that are legal in
16 and of themselves get perverted in a way that carries out a
17 scheme or artifice to defraud. And we could assume that if one
18 exercises sufficient control over a stock to command the price,
19 then there can be a manipulation. It may not be, doesn't have
20 to be, but it can be.

21 MR. LUSTBERG: Your Honor, you've stated the question
22 with precision.

23 THE COURT: Really. You're a good flatterer,
24 Mr. Lustberg.

25 MR. LUSTBERG: Well, you know that that's not my way.

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1 But an assignment case, which is what you're referring to --

2 THE COURT: Yes, right, an assignment.

3 MR. LUSTBERG: -- what Judge Friendly held there was
4 not simply that it was -- that doing something completely legal
5 could turn into something illegal if you had some sort of
6 mal-intent. In that case, it was an accountant, and the
7 accountant had certain disclosure obligations. He had to
8 certify, and that was the crime there. Here's the thing about
9 this case. This case is about trading. It's about huge
10 amounts of trading that was ultimately very unsuccessful. And
11 the question there is, Was that trading unlawful.

12 The government cites numerous cases for the
13 proposition that if you add, quote, unquote, manipulative
14 intent to the equation, then what was otherwise lawful suddenly
15 can become unlawful. But what I'm really requesting that your
16 Honor do very carefully is to look at each and everyone of
17 those cases. Because each of those cases, your Honor, are
18 cases in which there is classic securities fraud. There is
19 deception on the market. There are false signals being sent to
20 the market.

21 THE COURT: Isn't there an allegation of false signals
22 and deception? The government may not be able to prove them,
23 but they're alleged.

24 MR. LUSTBERG: They're not, your Honor. There really
25 are not allegations of false statements of deception. What

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1 there is, there's a number of allegations of fact that they say
2 amount to fraud. But each and everyone of those, every single
3 one of them is lawful conduct. So, for example, you yourself
4 just mentioned a few moments ago, high volume trading,
5 concentrated portfolios. Even if that's true, that is not
6 unlawful. And it's very clear that it's not unlawful to trade
7 in a big way, which is what Mr. Hwang did. They talk about the
8 trades were timed.

9 THE COURT: What was the purpose of the trading? Why
10 didn't he want to concentrate and buildup such large positions
11 and create an illiquidity that may have prevented him from ever
12 getting out? This is not in the indictment. I'm straying from
13 the indictment, but it's my curiosity.

14 MR. LUSTBERG: Sure. You're asking a fact question,
15 and here's what the facts would show. Mr. Hwang liked these
16 stocks. He traded in a very limited portfolio of names that he
17 studied well, and these particular names, these particular
18 securities were securities for companies that he believed in.
19 Not only did he believe in them, but he particularly believed
20 like every other investor in the world that the best time to
21 buy was when the number is low, is when the price is low. And
22 so as the price fell, he did as he had done for years, he
23 bought more.

24 But this goes to a proof question, and I think the
25 government would say the same thing that what I'm saying now to

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1 you is a proffer of what the evidence will show, but they have
2 to show, they have to allege that there's actual fraud, that
3 there's something that happened in the marketplace, the classic
4 indicia of securities fraud that the case law talked about.

5 THE COURT: They're talking about a fraud of using the
6 swaps as a way of building up the value of his position without
7 letting the market know that he really controlled more than 5
8 percent. That's fraud.

9 MR. LUSTBERG: So, your Honor, first of all, there is
10 a certain transparency in the marketplace because as the
11 government alleges each -- not every single time, but when
12 Mr. Hwang would buy sometimes, the counterparties would hedge
13 and buy those shares. All of which was readily disclosed to
14 the marketplace. But there's no allegation --

15 THE COURT: That's not so, is it?

16 MR. LUSTBERG: Pardon me.

17 THE COURT: How does the market know?

18 MR. LUSTBERG: Well, the market doesn't know it's
19 Mr. Hwang doing the trading, but they know that what's being
20 purchased in the market.

21 THE COURT: You can collect all that information, but
22 not very easily.

23 MR. LUSTBERG: Well, none of it is gathered very
24 easily, that's sort of not the point. But the question here is
25 whether in buying swaps which -- and remember, a swap is --

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1 your Honor knows what a swap is. You're essentially betting on
2 a stock. That doesn't have to be disclosed. And so what
3 you're saying is that -- what they're saying is that -- or if
4 they are saying this, and I'm not sure this allegation appears
5 anywhere in the indictment. In fact, I'm sure it doesn't
6 appear anywhere in the indictment. That by purchasing swaps
7 that he failed to disclose to the marketplace, he was obeying
8 something the law. The law does not -- and by the way --

9 THE COURT: I concede to you that entering into a swap
10 transaction is not forbidden by law.

11 MR. LUSTBERG: That's correct.

12 THE COURT: The issue whether is whether doing it in
13 such a way as to amass a control position over the trading of a
14 security for the purpose of inflating the value of its own
15 security in an artificial way cannot be illegal, cannot be a
16 fraud, cannot be a scheme or artifice to defraud. I take your
17 position. I understand what you're saying. May I ask a few
18 questions to Mr. Thomas.

19 MR. LUSTBERG: May I just respond to one thing that
20 your Honor just said, just one thing quickly.

21 THE COURT: Sure.

22 MR. LUSTBERG: I want to emphasize a word that you
23 just used when you summarized the allegation, and that summary
24 included the idea that his position was artificial. That there
25 was something artificial about the pricing.

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1 THE COURT: That's alleged.

2 MR. LUSTBERG: That's what's alleged. Well, yes and
3 no it's alleged. I mean the artificiality.

4 THE COURT: It's alleged that there was a false
5 inflation to the value of the stock.

6 MR. LUSTBERG: Well, the allegation is that that was
7 his intent. But artificiality requires a false statement to
8 the marketplace. That false statement comes about in cases of
9 spoofing or layering. It comes about in cases of wash sales.
10 It comes about in specific situations where false information
11 is injected into the marketplace.

12 THE COURT: You made that point somewhere earlier, and
13 I made the government give you a letter which outlined and will
14 give you more detail about the specific allegations and
15 misrepresentations.

16 MR. LUSTBERG: No, your Honor. That letter was on
17 something different. There's two sets of allegations in this
18 case. One set of allegations has to do with whether there were
19 false statements to the marketplace. The answer is, No, there
20 weren't. These were sales that the marketplace had the same
21 ability to understand as it would with regard to any other
22 swaps; and then if there was hedging, any other subsequent
23 transactions.

24 What you required the government to provide to us was
25 a list of the misrepresentations that Archegos allegedly made

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1 to the counterparties, to the banks. That's what you required
2 the government to provide.

3 THE COURT: This is responding to your point that
4 there was no misrepresentation involved regarding the swaps and
5 the intent of the swaps.

6 MR. LUSTBERG: So, your Honor --

7 THE COURT: You make a good point here. There are two
8 aspects of wrongdoing basically here. One is the conspiracy to
9 violate *Rico*, and the other is a securities fraud.

10 MR. LUSTBERG: There are two different securities
11 fraud violations that are alleged. One is manipulation, and
12 the other is fraud in connection with communications between
13 Archegos and the counterparties, the banks. Those are the two
14 different types of fraud allegations that are at issue. I'm
15 now only addressing the manipulation claim. And our argument,
16 your Honor, is that mere intent to influence the price is
17 insufficient to allege manipulation in a nutshell.

18 THE COURT: I think there's more than that, but let's
19 see what Mr. Thomas has to say on this.

20 MR. THOMAS: Your Honor, Mr. Podolsky is eager to
21 address this topic, so I'll turn it to him.

22 MR. PODOLSKY: Thank you, your Honor. Let me start
23 just by responding to a comment that Mr. Lustberg made several
24 times and led to the end of the colloquy that there must be
25 false statements made in connection with a market manipulation

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1 claim to proceed. I'm just going to quote now from the case
2 law, because this is not an open question. And I'll start with
3 *United States v. Royer*. This was Judge Rakoff sitting by
4 designation on the Second Circuit, and considering a market
5 manipulation claim. And what he pointed out was that in this
6 context 10(b)(5) prohibits not only conventional frauds brought
7 about by making materially false or misleading statements, but
8 also so-called constructive frauds; that is, other forms of
9 misconduct that have the same practical effect as a
10 conventional fraud. So that's 2008 in the Second Circuit.

11 And this point has actually been addressed more
12 recently by judges in this district, including Judge Cote in
13 *SEC v. Lek Securities*. And among other things she pointed out
14 that market manipulation can be accomplished through otherwise
15 legal means. As the Second Circuit has noted, and she goes on
16 to quote, *ATSI*, a Second Circuit decision; in some cases,
17 scienter is the only factor that distinguishes legitimate
18 trading from improper manipulation. And I'll point to one
19 other decision. This is Judge Holwell's decision in *Masri* in
20 2007. And Judge Holwell also stated, market manipulation can
21 also be accomplished through otherwise legal means, such as
22 short sales and large or carefully timed purchases or sales of
23 stock.

24 THE COURT: And that's what you allege?

25 MR. PODOLSKY: And that is exactly what we allege.

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1 And these are decisions of this district and this Circuit
2 stating clearly that the defendant's legal position is wrong,
3 and their view of what is required to be alleged is incorrect.

4 THE COURT: I think, Mr. Lustberg, that's what I hold.
5 I think that is what I hold. There is an adequate allegation
6 in the indictment just to that effect, that the entering into
7 the swaps along with the manipulative purpose that's alleged
8 and the misstatements that are alleged carry out a fraud. It
9 sufficiently alleges a conspiracy among the four to carry out
10 this manipulation.

11 Now, I want to ask this of Mr. Thomas. What is the
12 bright line, if any, between lawful trading in swaps, between
13 lawful placement of trades. The timing of trades at the close
14 or at the beginning of the market or after hours or before
15 hours, permissible activities and a manipulative activity, such
16 as you allege in the indictment? Is there a bright line?

17 MR. PODOLSKY: I think that's a great question, your
18 Honor. I think the best way to answer it is to point to the
19 elements that I expect the government will prove at trial which
20 is, first, as relevant to your question, that the defendant
21 engaged in practices that affected or controlled the price of
22 the securities. So those are the techniques that your Honor
23 was just adverting to.

24 And then second that the defendant did it knowingly
25 and willfully and with the intent to affect or control those

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1 prices. And so the government does --

2 THE COURT: Affect or control are different.

3 MR. PODOLSKY: That's right, your Honor. And I
4 believe the case law provides either one would be sufficient.
5 So in order to either control or increase or decrease the price
6 of the security.

7 THE COURT: It can be argued that every single sale or
8 purchase of a security can affect the price.

9 MR. PODOLSKY: That's right, your Honor. And that's
10 why that intent, that knowing and willful and intent to
11 manipulate are what distinguishes lawful from unlawful
12 manipulation.

13 THE COURT: How do you define manipulation?

14 MR. PODOLSKY: Your Honor, just as I said, and I'm
15 happy to pull up a citation here.

16 THE COURT: Tell me what you understand is
17 manipulation.

18 MR. PODOLSKY: Yes, your Honor. It's any technique,
19 in this case it's trading techniques that are carried out with
20 the intent, as I said, to create an artificial price; that is
21 to interfere with the natural interplay of supply and demand by
22 controlling, increasing or decreasing the price of the
23 security.

24 THE COURT: You agree with that definition,
25 Mr. Lustberg?

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1 MR. LUSTBERG: I really don't disagree with that
2 definition, your Honor, except that there's more to. And if I
3 might let me explain.

4 THE COURT: What more is there to it?

5 MR. LUSTBERG: The more to it has to be some
6 fraudulent conduct. This is securities fraud. And, your
7 Honor, I'm going to take --

8 THE COURT: I believe the Second Circuit has said
9 that, Mr. Thomas. It must be some fraudulent activity, some
10 deception. I think you allege it --

11 MR. PODOLSKY: We do extensively, your Honor.

12 THE COURT: -- to the things that were said and not
13 said to the counterparties for one, and perhaps in other ways
14 as well. But there does have to be some kind of fraudulent
15 activity.

16 MR. PODOLSKY: That's right, your Honor. What we've
17 alleged as we've stated, and I think your Honor adverted to
18 this several times, is that by using swaps to carry this out,
19 by timing the trades, by the size of the trades and so on, each
20 of those were techniques that were used to deceive the market,
21 to send a false pricing signal to the market.

22 THE COURT: Give me those incidents again.

23 MR. PODOLSKY: Sure. So, for example, your Honor, and
24 I believe this is alleged throughout the indictment including
25 at paragraph four, but your Honor referred to it. The use of

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1 swap counterparties to disguise and deceive the market as to
2 the extent of demand for these stocks. And at paragraph 35 of
3 the indictment, the indictment alleges manipulative and
4 deceptive trading techniques, such as purchasing or selling
5 securities at particular strategic times of day, transacting in
6 certain securities in large amounts or high volume.

7 THE COURT: Mr. Lustberg is going to answer, those are
8 conventional activities.

9 MR. PODOLSKY: That's right, your Honor. And that's
10 why I adverted to, for example, *Lek Securities*, Judge Cote's
11 decision, Judge Holwell's decision in *Masri*, that when those
12 activities, which as your Honor noted, can impact the price of
13 a stock are carried out with the intention to impact the price
14 of the stock, they become manipulative. As we've said in our
15 briefing and as I read a few moments ago, that's what the case
16 law in this circuit holds.

17 MR. LUSTBERG: Your Honor, I don't want to interrupt,
18 if I may.

19 THE COURT: One moment. Every purchase, every sale
20 can affect the market.

21 MR. PODOLSKY: That's correct, your Honor.

22 THE COURT: If it's a large purchase for sale, it can
23 affect the market. No one would say it's illegal to engage in
24 a large transaction. No one can say that it's illegal to enter
25 into a swap transaction. But you're saying the combination of

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1 these activities can be illegal?

2 MR. PODOLSKY: That's right, your Honor. As we note
3 both in the indictment, as I think your Honor said a few
4 moments ago, the way that these techniques were designed and
5 used was intentionally deceptive and designed to manipulate the
6 market. And as I pointed out, that's what the Second Circuit
7 as well as Judge Cote, Judge Holwell have held to be sufficient
8 to allege market manipulation.

9 THE COURT: Let me make this observation. At this
10 point, given the different contentions of the parties, the
11 difficulty in defining manipulation, the difficulty in drawing
12 a bright line between activity that is lawful in itself and
13 activities that taken together and with a malevolent purpose
14 can be unlawful, that's a mistake for a district judge to
15 dismiss the indictment.

16 The government may not prove its point. The
17 government may not be able to prove its manipulation, but I
18 think it needs to be done on a complete record; and then maybe
19 I can decide or more likely a jury can decide whether there is
20 or is not manipulation.

21 MR. LUSTBERG: We agree, your Honor.

22 THE COURT: Let's go over now the techniques of it.
23 First allegation, a conspiracy to commit a *Rico* fraud.
24 Mr. Lustberg points out that you never alleged a pattern. What
25 is the pattern? Does it have to be alleged or is it sufficient

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1 to say you conspired to commit a *Rico* fraud?

2 MR. THOMAS: Your Honor, I'll address this one if I
3 could. The indictment contains all the allegations that are
4 necessary to allege --

5 THE COURT: Where is the pattern?

6 MR. THOMAS: -- that there was an agreement to conduct
7 the affairs of Archegos through a pattern of racketeering.

8 THE COURT: You sufficiently allege an agreement.
9 Ms. Mulligan may disagree, but we'll have that later on.

10 MR. THOMAS: Yes, your Honor. I underscore this
11 distinction --

12 THE COURT: Listen to me. I'm not commenting on an
13 allegation of a conspiracy. I'm in agreement. I'm not at this
14 point commenting on the existence of an enterprise. I'm asking
15 you about a pattern of racketeering activity. Where in the
16 indictment do I find that; and is it necessary to allege that?

17 MR. THOMAS: Your Honor, the answer to the second
18 question is no. What needs to be alleged is that there was an
19 agreement to conduct the affairs of the enterprise through a
20 pattern of racketeering activity. The only charge under the
21 racketeering statute that is contained in the indictment is a
22 conspiracy charge. There is no substantive count. So all that
23 need be alleged is that the participants, the conspirators in
24 the scheme agreed to conduct the affairs through a pattern of
25 racketeering activity.

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1 THE COURT: So it's sufficient for an indictment to
2 allege the comprehensive fact or comprehensive theory, but not
3 the underlying facts?

4 MR. THOMAS: Yes, your Honor. Including --

5 THE COURT: It's not necessary for the indictment to
6 allege the specific acts that constitute a pattern?

7 MR. THOMAS: Your Honor, the indictment does do that.
8 The answer to the legal question that you're asking is, it is
9 sufficient for the government to allege for an indictment to
10 contain an allegation that there was an agreement to operate it
11 through a pattern of racketeering activity, and to provide no
12 further delineation of the pattern. As it happens here, the
13 indictment does contain specific allegations about the pattern.

14 THE COURT: I concede the first part, but not the
15 second part. Where is the second part?

16 MR. THOMAS: Your Honor, a couple of things. First of
17 all, if you look, for example, in paragraph 68 which is printed
18 page 48 as numbered of the indictment. Starting at the bottom
19 of the page the indictment alleges that the conspirators
20 agreed -- and I quote now, "To conduct and participate directly
21 and indirectly in the conduct of the affairs of the Archegos
22 enterprise through a pattern of racketeering activity, as that
23 term is defined in Title 18, United States Code, 1961(1) and
24 1961(5)."

25 THE COURT: I see subparagraphs A to C. They're not

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1 very helpful. It maybe sufficient I guess, but they're not
2 very helpful. They don't tell us anything.

3 MR. THOMAS: Your Honor, they're plainly sufficient
4 under the Second Circuit's decision in *Applins* which said for
5 conspiracy allegations of this sort where there are categories
6 of criminal conduct that are at the object of the scheme, it is
7 sufficient for the indictment to allege those categories. And
8 those categories are themselves a pattern of racketeering
9 activity if they are related to the enterprise. And those
10 allegations too are found more specifically in the paragraphs
11 that follow where it identifies in the indictment the purposes
12 of the racketeering conspiracy.

13 THE COURT: Where is that?

14 MR. THOMAS: Starting at paragraph 70, and then
15 continuing to paragraph 71, 72 and 73.

16 THE COURT: What pattern? I understand.
17 Mr. Lustberg, would you agree with Mr. Thomas that
18 subparagraphs A, B and C sufficiently allege for the purpose of
19 an indictment the pattern?

20 MR. LUSTBERG: Absolutely not, your Honor. Let me
21 start with his legal point. The agreement that they have to
22 allege under the Second Circuit cases of *Cain* and *Satinwood* is
23 they have to agree that the co-conspirators would further and
24 endeavor, which if completed would satisfy all of the elements
25 of a substantive *Rico* offense. That is, they want to say that

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1 just because this is a conspiracy charge and not a substantive
2 Rico charge that they don't have to adequately allege, as
3 you've asked, a pattern, but that isn't correct.

4 THE COURT: That's their allegation.

5 MR. LUSTBERG: That's their argument.

6 THE COURT: And they accuse you of importing civil
7 cases into the criminal law.

8 MR. LUSTBERG: Your Honor, their brief is replete with
9 civil cases, both in the manipulation context and in the Rico
10 context. It's not the least bit unusual to rely on civil
11 cases.

12 THE COURT: We take the law where we find them, but I
13 think Mr. Thomas is correct about the obligations of pleading.

14 MR. LUSTBERG: Except, your Honor, that the
15 agreement -- so, for example, Judge, if you were to say, there
16 was an agreement to violate -- to rob a bank, but there was no
17 bank involved, then you haven't adequately alleged a
18 conspiracy. Here, the agreement has to be to violate Rico;
19 that is, through a pattern of racketeering activity. So it's
20 perfectly appropriate -- and the case law does this -- looks to
21 whether a pattern is alleged. And a pattern, as we've set
22 forth, is not alleged here for two reasons:

23 Number one, there's not two predicate acts. There's
24 one in. And the one is mail fraud, which as we know is their
25 theory is under attack in the Supreme Court. But the second

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1 one --

2 THE COURT: Offenses involving fraud in the sale of
3 securities.

4 MR. LUSTBERG: Fraud in the sale of securities, and
5 under *Rico* uniquely it has to be fraud in the sale of
6 securities. But, your Honor, one looks not just to the
7 conclusory allegations of the indictment, but look at all the
8 allegations. And what these allegations are about has to do
9 with Mr. Hwang's purchase of securities, not sales.

10 THE COURT: I think you're requiring too much of an
11 indictment.

12 MR. LUSTBERG: Your Honor, I mean, it's not about
13 requiring too much. An indictment is measured -- one looks at
14 an indictment and says, Does this indictment allege a crime.
15 If everything they say is true, does it amount to a crime?
16 They do not in this indictment --

17 THE COURT: Let me ask Mr. Thomas, the allegation of
18 offenses involving fraud in the sale of securities, and that's
19 to "B" as well. Mr. Lustberg is arguing that if there's a
20 fraud here, it's involved in the purchase of securities, not in
21 the sale. And so these allegations contradict other
22 allegations in the indictment.

23 MR. THOMAS: Your Honor, Mr. Lustberg is wrong on this
24 point, both factually in terms of describing what's in the
25 indictment. The paragraph 35 that Mr. Podolsky referred the

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1 Court to talks about, for example, instances in which Archegos
2 used sales itself as the seller in order to further its
3 fraudulent scheme. And as the Court just observed in paragraph
4 68 --

5 THE COURT: Let me read 35. Just a minute.

6 (Pause)

7 THE COURT: Subparagraph B talks about purchases, as
8 does C, as does D.

9 MR. THOMAS: Your Honor, I direct the Court to the
10 introductory paragraph that says, "In particular Bill Hwang
11 influenced the prices of stocks by utilizing manipulative and
12 deceptive trading techniques, such as purchasing or selling
13 securities at particular strategic times of day."

14 THE COURT: I skip that because it's the generality.

15 MR. THOMAS: Your Honor, the indictment need not
16 contain more than a concise statement of the offense, and that
17 paragraph doesn't stand alone. It stands next to the paragraph
18 68 allegations which assert literally that there was fraud in
19 connection with the sale of securities. But Mr. Lustberg is
20 also wrong as a matter of law that these allegations about the
21 purchases are not themselves related to the sale of securities.
22 Obviously for every security --

23 THE COURT: How so?

24 MR. THOMAS: Every security that Archegos purchased
25 was sold to it by a deceived counter-party, so there's a sale

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1 of securities involved in every transaction.

2 THE COURT: The sale gave more benefit to the sellers
3 because of the manipulation of the price. In other words, the
4 sellers sold into an inflated price, and therefore made more
5 money.

6 MR. THOMAS: Your Honor, I'm referring to the
7 counterparties who loss billions of dollars because of their
8 reliance on Mr. Hwang's team's false statements.

9 THE COURT: Maybe because they built up their own long
10 position.

11 MR. THOMAS: Well, as Mr. Lustberg referred to, the
12 typical practice at the counterparties was to go into the
13 market and buy one share of the stock. And so when Mr. Hwang
14 wanted to take a particular bet, there would be a corresponding
15 echo in the equities market by the counter-party.

16 THE COURT: The counterparties are hedging. It's a
17 classic hedge. They have to sell back the security which is
18 the swap at a certain time and at a certain price. And so they
19 go into the market and buildup a long position. They hedge
20 against that. The problem here is that the buyer of the
21 counter-party, that is Archegos, didn't have the money to honor
22 the trade; and so the price collapsed and the counter-party was
23 left holding stock that didn't have the value it was supposed
24 to have.

25 MR. THOMAS: Your Honor is absolutely correct in

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1 assessing those dynamics. What I wanted to draw the Court to
2 was first a factual point, which is that Archegos's involvement
3 with the counterparties is an involvement in the counterparties
4 selling swaps to Archegos, so sales are involved. And Justice
5 O'Connor in a concurrence in the *Holmes* case observed that this
6 language best be read to require there to be conduct
7 sufficiently willful to constitute a crime and a sale of
8 securities; not that the seller be the one or the sale itself
9 be the thing that affected the fraud. That leads me to the
10 second point --

11 THE COURT: The consequences of the fraud would be for
12 selling the liquidation. It doesn't have to be part of the
13 fraud, it could be the consequence of the fraud. Is that what
14 you're saying?

15 MR. THOMAS: Your Honor, what we're saying is that the
16 law only requires there to be a sale somewhere in the scheme,
17 and here there are many sales, and judges in this Circuit have
18 so found.

19 THE COURT: I'm sure Mr. Hwang did not consider sales
20 as a part of his scheme.

21 MR. THOMAS: Your Honor, that also is factually
22 inaccurate in the sense that the indictment alleges that
23 Mr. Hwang took short positions in certain of the securities.
24 And there's a table at the beginning of the indictment that
25 identifies various tickers that Mr. Hwang manipulated through

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1 his trading, and includes in it a list of two tickers that he
2 manipulated on the short side.

3 THE COURT: I noticed that, but there are no
4 allegations to make me understand what they were and how they
5 did it. I know what they are. I saw the table, but I don't
6 know how that was part of a manipulative scheme. There's no
7 allegation regarding that.

8 MR. THOMAS: Respectfully, your Honor, we think that
9 paragraph 35 and paragraphs 68 do provide all that's required
10 under Rule 7 to describe there being a sale of securities in
11 connection with the fraud. And further as I pointed out,
12 judges in this Circuit, including Judge Cabranes when he was on
13 the district court have held essentially that any willful
14 violation of 10(b) is a *Rico* predicate. And so the suggestion
15 that there needs to be some very specific type of sale conduct
16 in the fact pattern is both wrong legally, but also ignores the
17 instances in the indictment in which sales are described.

18 THE COURT: Something with all of this is that this
19 case is different. I've never seen a swap case like this in
20 the literature. Bottom line is that you've alleged a
21 conspiracy. You've alleged the enterprise and you've
22 sufficiently alleged a pattern of racketeering activity by the
23 general allegations of the subparagraphs under paragraph 35.
24 that's your position?

25 MR. THOMAS: Yes, your Honor. And in our briefing we

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1 point --

2 THE COURT: And Mr. Lustberg points out that they
3 don't make sense. It maybe it's true, Mr. Lustberg. But
4 again, I think at this time on this record I cannot rule
5 against the government in the sufficiency of the indictment.

6 MR. LUSTBERG: Your Honor, I understand the Court's
7 ruling. I'm not quarreling with the Court, except that I sort
8 of am.

9 THE COURT: Well, sure you are. That's what you're
10 paid to do. You do it so well.

11 MR. LUSTBERG: Which is to say this: The government,
12 as Mr. Thomas has and Mr. Podolsky have both talked about
13 sufficiency of allegations and Rule 7 of the Federal Rules of
14 Criminal Procedure. And in fact in their brief they talk about
15 the fact that the elements of the crime is alleged in each
16 case, and that we are on notice of the allegations against us.
17 And when they talk about the notice, they talk about the
18 extensive factual allegations in this indictment.

19 And what we're saying to your Honor right now is that
20 those extensive allegations, to the extent that that is the
21 basis for them arguing to the Court that we have sufficient
22 notice should be taken seriously. And when one looks at this
23 indictment, one is left with the firm conviction that that the
24 fraud that's alleged here is that Mr. Hwang traded in order to
25 keep the price up or get the price to go up. That is the

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1 allegation of this indictment. And now suddenly they're saying
2 that, well, even though the language of the statute, that is
3 the *Rico* statute, requires a fraud in the sale of securities,
4 that a set of allegations that go purely to purchases of
5 securities is sufficient to allege the crime.

6 Congress could easily have said when it wrote *Rico*
7 that it went to purchase of sale of securities, the same way as
8 they said it under 10(b), but they didn't. They focused on the
9 sale of securities. And the government wants to read that out
10 of the statute today, and respectfully we don't think you
11 should. I hear your Honor when you say that there's enough to
12 get pass an indictment, that we should do this on a full
13 record, that we should do it at a trial. But a trial here,
14 Judge, with regard to this whole range of conduct, which is --
15 I thought Mr. Podolsky did a very good job of summarizing for
16 your Honor what was in the indictment with regard to what they
17 say shows fraudulent intent, the fraudulent intent that's
18 required for a securities fraud violation. He said three
19 things. He said that it's the use of swaps. It's timing, and
20 it's the size of the trades. None of those things is remotely
21 unlawful.

22 THE COURT: We've gone over that.

23 MR. LUSTBERG: I know you have, but I told you I was
24 going to quarrel.

25 THE COURT: We've gone over that.

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1 MR. LUSTBERG: Respectfully, Judge, I just think that
2 we're going to have a trial here on a set of allegations that
3 do not amount to a crime. And this is true in the *Rico*
4 context, and it's true in the securities fraud context, and
5 it's absolutely true in the manipulation context. Mr. Hwang's
6 trades were just that, trades. There's no spoofing. There's
7 no layering. There's no wash sales. There's none of the
8 traditional indicia of fraud.

9 And all of the cases that Mr. Podolsky cited to the
10 Court, *Lek Securities*, *Royer* and *Masri* all had indicia of
11 fraud, all had the same indicia of fraud that the Court
12 requires over and over. Respectfully, I think a careful
13 reading of the case law that's cited leads inexorably to the
14 conclusion that these allegations are insufficient. And we can
15 wait and have your Honor decide that on a Rule 29 motion, but
16 this is an apt time to decide it.

17 MS. MULLIGAN: I'm happy to wait until later in the
18 conference --

19 THE COURT: I heard everybody else, Ms. Mulligan. Let
20 me hear you.

21 MS. MULLIGAN: I'm hearing decisions and I'd like to
22 weight in.

23 THE COURT: Go ahead.

24 MS. MULLIGAN: First of all with respect to the
25 manipulative trading. The indictment alleges no role by my

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1 client Mr. Halligan with respect to the manipulative trades in
2 the indictment, and indeed he's not charged with the
3 substantive count of manipulative trading.

4 Now with respect to this *Rico* conspiracy, your Honor,
5 I think a decision that's directly on point is by your former
6 colleague the late great Judge Patterson, and that is discussed
7 in pages eight and nine of my reply brief which is *In re Par*
8 *Pharma*. In that case Judge Patterson is very clear. This *Rico*
9 statute, it requires more or every securities fraud would be
10 swept in, and you know that's not the case. This is a very
11 unusual securities *Rico*. It's not the type of *Rico* that the
12 Southern District typically charges. We would in fact have a
13 very different detailed allegations.

14 If this was a gangs *Rico* indictment, your Honor. We
15 would have may to wit clause where we would know when the
16 narcotic sales were, who they were sold to, and this is not
17 that type of indictment. But with respect to this issue of the
18 predicate act. As Judge Patterson said in that case, your
19 Honor, it has to be in relation to the sale of the security.
20 Congress meant that when they said it. They didn't hedge on
21 this language, and that's the law, your Honor. And that's just
22 not alleged here. And this *Rico* indictment it fails on
23 numerous grounds.

24 THE COURT: What are we talking about Section 1348?
25 What section of the criminal code?

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1 MS. MULLIGAN: This is 1961(d), the *Rico* conspiracy,
2 your Honor. And the predicate acts are defined in 1961, I
3 believe it's (1)(D). Congress was very clear, your Honor, in
4 delegating certain specific acts. In other parts of the law,
5 it uses the term "purchase or sale of securities." In other
6 specific parts of the criminal code it uses, "in connection
7 with." And, your Honor, precision is particularly required in
8 criminal cases where defendants have to have full and fair
9 notice.

10 THE COURT: I'm looking for that part of 1961.

11 MR. HAGGERTY: Your Honor, the reference appears at
12 18, U.S.C., 1961, Section 1, Subsection D. It's a long
13 somewhat rambling provision with multiple statutory references,
14 fraud in the sale of securities provision appears --

15 THE COURT: Where?

16 MR. HAGGERTY: It appears maybe 7/8 of the way down.

17 THE COURT: After biological weapons?

18 MR. HAGGERTY: Yes, it is. In the copy I have six
19 lines below biological weapons.

20 THE COURT: Fraud in the sale of securities.

21 MR. THOMAS: Your Honor, may I respond to
22 Ms. Mulligan's point?

23 THE COURT: Yes.

24 MR. THOMAS: In our responsive briefing on this at
25 page 20, we collect a number of authorities, including the

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1 Judge Cabranes' decision that I mentioned before that interpret
2 than phrase. They include, for example, a decision by Judge
3 Nickerson that rejects this very argument that that language
4 ought to be read in a cribbed and specific way, who held, "Any
5 violation of 10(b) sufficiently willful to trigger the criminal
6 penalties of Section 32(a) constitutes fraud in the sale of
7 securities."

8 Then there's the Judge Cabranes decision that I
9 mentioned, and other decisions that we collect too that
10 essentially support the idea that fraud in the sale of
11 securities is used in the *Rico* statute reaches a broader swath
12 of conduct than what Ms. Mulligan or Mr. Lustberg would have
13 the Court conclude here. And there is congressional reason to
14 believe that reading is accurate because when the PSLRA was
15 amended to strip from civil plaintiffs the ability to bring
16 *Rico* claims alleging securities fraud, Congress stripped from
17 them the right to bring any fraud actionable in the purchase or
18 sale of securities. And the citation for that Congressional
19 action is set forth in footnote three also on page 20. So the
20 notion that Congress could have spoken on this topic is of
21 course true and goes against --

22 THE COURT: The healing argument that this shorthand
23 reference in Section 1961 left out the typical phrase, in
24 connection with the purchase or sales. I understand that.
25 We're in error of a strict interpretation of law. Let me ask

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1 you a different question. What was the goal of Mr. Hwang
2 allegedly, claimedly? What did he want to do at the end of the
3 day?

4 MR. THOMAS: Your Honor, the indictment alleges that
5 his goal was to run Archegos through a pattern of criminal
6 conduct. But if you're asking me as someone familiar with the
7 facts what he had in his mind beyond that?

8 THE COURT: Yes.

9 MR. THOMAS: I think Mr. Hwang wanted to control the
10 markets, your Honor. I think he wanted to be an
11 extraordinarily wealthy person, that he wanted to be successful
12 beyond measure.

13 THE COURT: So it's a pump and dump scheme?

14 MR. THOMAS: I think it's a pump and brag scheme, your
15 Honor.

16 THE COURT: Pump and brag?

17 MR. THOMAS: Mr. Hwang decided that if he affected the
18 trades that we allege that he did, he could take over the
19 majority of multiple major U.S. corporations freely trading
20 stock. And as a result on paper claim absolutely unimaginable
21 wealth, and that's precisely what he did until his scheme
22 failed and it unraveled.

23 THE COURT: Is there any indication that he used it to
24 inflate his balance sheet to get personal loans or somehow get
25 distributions of money into his own pockets?

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1 MR. THOMAS: Your Honor, the indictment describes
2 multiple instances in which the very success of the fraud was
3 recycled in the form of further statements to the
4 counterparties to obtain yet additional trading capacity.

5 THE COURT: I understand that. I understand that
6 allegation. What I'm trying to figure out in my mind to what
7 end? A price can't stay artificially inflated. The bubble has
8 to be pierced at some point in time. And when that happens,
9 the position that Mr. Hwang built up would come to haunt him
10 which is what happened here. He lost his money. If he were
11 doing a certain amount of inflation to cover a larger amount of
12 short selling, I could understand it. But I'm trying to figure
13 out in my mind that I'm not succeeding, What was in it for him.
14 What did he want. What did he want to achieve. Being a big
15 shot, I suppose that's possible, but it doesn't seem to me that
16 that was his aim. I can't figure out his aim.

17 MR. THOMAS: We certainly appreciate the Court's
18 questions. I think there will be trial proof that would fill
19 in some of that context as to what Mr. Hwang had in mind.

20 THE COURT: Like what? You want to give me a hint.

21 MR. THOMAS: Yes, your Honor. One immediate object
22 was in order to achieve the kind of wealth and success that he
23 desired, they had to convince all of these counterparties to
24 give them sufficient trading quantity to make it happen. So
25 for a period of the scheme, the intention is just that, to

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1 achieve it's criminal object. Later on Mr. Hwang, we expect
2 there'll be witnesses to say, will describe the sort of king of
3 the universe type thinking that I was laying out for the Court,
4 and that he had visions of grandeur to put it bluntly. And
5 also there'll be evidence that Mr. Hwang did look for
6 profitable offramps, ways to close out of these positions and
7 lock in enormous gains; but that he was less successful at
8 doing that than he was at driving up the stock price.

9 THE COURT: What are we not covering in the form of
10 dismissal? I think we covered all the points? My ruling is
11 the indictment is legally sufficient at this point in time,
12 although it raises numerous questions in my mind.

13 MR. VALEN: Your Honor, if I may. I think the
14 arguments so far have addressed Counts One through Nine, but
15 not the counts that come after as to which we have different
16 arguments.

17 THE COURT: Let me check that. Ten seems to be a
18 repetition of one through nine.

19 MR. VALEN: I think, Judge, and as I read it, I
20 welcome the government's clarification, Count One is *Rico*.
21 Counts Two through Nine are securities fraud through market
22 manipulation. But Count Ten is more traditional securities
23 fraud through what alleges subsections A and C as well. The
24 last line of paragraph 80 makes clear that it's securities
25 fraud through false and misleading statements regarding

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1 Archego's business portfolio and assets.

2 THE COURT: We've gone over that before. The
3 misrepresentations that makeup part of a manipulation story. I
4 take it out and in and of themselves make the subject of Count
5 Ten. I rule, it's the same reasons I ruled before, legally
6 sufficient. Wire fraud, again it's the same thing since the
7 use of wires are involved, that's wire fraud, as well as
8 securities fraud.

9 MR. VALEN: Judge, with respect to Count Ten, we have
10 an argument regarding the Second Circuit's controlling
11 precedent in the *Charles Schwab* case and the "In connection
12 with" requirement that we briefed. If you have any questions
13 about it, I'd be happy to address them, but I think Count Ten
14 in particular is deficient in the regard.

15 THE COURT: Address it. Make sure I understand it.

16 MR. VALEN: Sure. Count Ten is charged under Section
17 10(b) and 10(b)(5) as the other fraud counts are. And the
18 Supreme Court and Court of Appeals, and the government I think
19 would not dispute that those claims require that the
20 misrepresentations were made in connection with the purchaser
21 sale of the security. That language is included in both
22 Section 10(b) and in 10(b)(5), and it applies to claims under
23 Subsections A, B and C of 10(b)(5). But the Court of Appeals
24 for the Second Circuit in particular has addressed the
25 requirement, the "In connection with" requirement in a bit more

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1 detail. And most recently in a 2018 decision, which is
2 described in our briefs, *Charles Schwab Corp v. Bank of America*
3 *Corp*, the Court of Appeals has described the "in connection
4 with" requirement as follows: A claim fails where the
5 plaintiff does not allege that a defendant misled him
6 concerning the value of the securities he sold or the
7 consideration he received in return?

8 THE COURT: Or the what?

9 MR. VALEN: Or the consideration he received in
10 return. Now I'm adding, for those securities, but I think
11 that's implicit in the quote. And one thing when you focus on
12 that language, it's important to recognize --

13 THE COURT: You think that's the language of
14 limitation or a language of description?

15 MR. VALEN: I think it's a language if -- it works
16 both ways. It's a language of description in the sense that
17 the Court of Appeals is telling us what the subject matter of
18 the misrepresentation has to be.

19 THE COURT: It describe that case. It doesn't
20 describe all kinds of fraud. That doesn't work. Okay. We're
21 finish with that.

22 MR. VALEN: Your Honor, we also have arguments with
23 respect to Count 11, the wire fraud count. Although our
24 argument is simply that there's a pending United States Supreme
25 Court case that's been fully argued. And I check this morning,

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1 the decision hasn't issued today, but it'll certainly issue on
2 a Tuesday between now and the end of June that promises to
3 impact that count. All we ask is that you give us leave to
4 file a future motion depending on the outcome of that decision.

5 THE COURT: Mr. Valen, it makes no difference. When
6 you go into the jury trial, this particular count doesn't
7 matter. Everything that is put into Counts One through Nine is
8 what matters. And the jury doesn't see this indictment, which
9 answers another part of the problem. I don't give the
10 indictment to the jury. It will be summarized and perhaps read
11 verbatim, though I hesitate to do that because I don't think
12 the jury will hear anything else. They'd be sleep by time you
13 finish. It will be summarized and then you'll argue. And I
14 don't think the arguments going to hang on wire fraud or not.

15 MR. VALEN: Thank you, Judge. With respect to what's
16 done with the indictment, we do have a motion to strike
17 references to some prior allegations.

18 THE COURT: Allegation four. Look, the question is,
19 Can you use it before a jury. You can argue you can't. And
20 the government said -- I don't know what the government is
21 going to say. I'll decide that issue, whether it's in the
22 indictment or not doesn't mean anything. It's public on
23 public, so it doesn't matter. That motion is denied as
24 academic.

25 MS. MULLIGAN: Your Honor, will your Honor be issuing

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1 a decision or are today's rulings the decision of the Court?

2 THE COURT: Thanks, I was going to say something about
3 that. My habit is to follow my oral rulings with a short
4 summary decision. It will not be as long as Judge Rakoff's
5 decisions, but it will be quite short and will hit the points.
6 Until that time, I reserve the right to change my mind, but I
7 thought it would be useful to you to give you my considered
8 judgments at this point in time.

9 MS. MULLIGAN: Thank you, your Honor.

10 THE COURT: I have now heard your arguments, and I'll
11 take them into consideration before I issue a written
12 statement.

13 MS. MULLIGAN: Your Honor, I'd just like to raise a
14 few additional points on behalf of Mr. Halligan.

15 THE COURT: Sure.

16 MS. MULLIGAN: As we mentioned in our brief with
17 respect to the *Rico* count, your Honor. We believe the *Rico*
18 count fails because it does not allege Mr. Halligan's agreement
19 to engage in manipulative trading.

20 THE COURT: It says they all conspired, agreed and
21 conspired.

22 MS. MULLIGAN: Right, your Honor. But they don't give
23 us any specific details. And under *United States v. Benjamin*
24 when these terms "conspire" are used, they need to descend into
25 the particulars. And we're sitting here right now not knowing

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1 what that is. Because as I opened with, and obviously there's
2 no dispute, Mr. Halligan did not participate or have a role in
3 the trades that are alleged in the indictment to be
4 manipulative.

5 THE COURT: He was the chief financial officer, and
6 it's alleged that he participated, and I suppose he
7 participated by supporting the documentation of all the
8 transactions. Each trade is reflected in some kind of a
9 record. The indictment does not specify. It says they
10 conspired and agreed, and that's sufficient.

11 MS. MULLIGAN: Thank you, your Honor. Obviously, I
12 think more is required because every CFO in the United States
13 would then be indicted if they're a company. But with respect
14 to individual, your Honor, there needs to be some showing of
15 the agreement, and that's just not here. But, your Honor, we
16 await your decision, and we rely on all of the arguments in the
17 opening brief and in our reply brief. Thank you very much.

18 THE COURT: Any matter of controversy given the rules
19 of pleading that exist in a criminal case, there's a danger you
20 talked about. It sweeps in criminal conduct and permissible
21 conduct. I can't cure that now. What's left, the bill of
22 particulars.

23 MR. THOMAS: Particulars and the defense misconduct
24 motion, your Honor.

25 THE COURT: Let's do the bill of particulars. The

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1 first aspect of this is the government should identify all
2 alleged misrepresentations, requests themselves as for every
3 and all. That's denied because it seeks evidence. A bill of
4 particulars is there just to give notice. The government has
5 done that in the indictment and by the supplemental letter of
6 August 18, 2022, and that's sufficient.

7 The government should identify uncharged
8 co-conspirators and others. That's an allegation in every
9 conspiracy case I've seen, and I think the cases are legion
10 that the unindicted co-conspirator did not have to be alleged.
11 Having said that, it may be something that I want the
12 government to be more specific about when we approach trial.

13 MR. THOMAS: Yes, your Honor.

14 THE COURT: And "C" is the government should identify
15 all acts and transactions alleged to comprise the purported
16 schemes. I think there is sufficient allegation to give notice
17 on that, and that is denied as well. "D", the government
18 should identify allegedly defrauded victims. That's not part
19 of the case. You don't have to -- withdrawn. One defrauded
20 victim is the counterparties. All the counterparties have been
21 allegedly defrauded. Anyone who lost money having a hedged
22 position and being able to liquidate the collateral that was
23 put up by the conspirators is a defrauded victim. I don't
24 think you need anything more specific than that. "E" the
25 government should identify the date of the alleged Archegos

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1 enterprise was formed and the alleged scheme to defraud began.
2 The government gave a span of a year of 2020 to what,
3 Mr. Thomas?

4 MR. THOMAS: Your Honor, let me read for you exactly
5 what's alleged. In or about 2020, up to March 2021.

6 THE COURT: That's sufficient for the dates. "F" the
7 government should identify all instances in which defendants
8 are alleged to have aid and abetted supposed misrepresentations
9 to counterparties. The instances do not all have to be alleged
10 in the indictment. There is sufficient notice to allow the
11 defendants to form a defense. I deny all these aspects of the
12 motion for bill of particulars.

13 The next is the *Brady* obligation. This is a claim
14 about the inadequacy in the *Brady* obligations is based on a
15 supposed on a part of the prosecutor to search the
16 investigative files of the SEC and of the Commodities Futures
17 Trade Commission, the CFTC, to see if there's anything that
18 would be of a *Brady* type of document and to produce it.
19 There's no indication that these were joint investigations.
20 The fact that representatives of the SEC and the CFTC may have
21 been present at the interviews of various witnesses,
22 particularly of the proffer given by Mr. Hwang doesn't show any
23 joint investigation. The SEC and the CFTC have not played a
24 part in this criminal prosecution. They have not appeared
25 before the grand jury. They have not appeared in any of the

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1 pretrial proceedings here, and there is no connection for
2 the -- if the prosecutor were required to search the immense
3 files that can be built up by the SEC and the CFTC, it would be
4 an impossible obligation. The motion is denied.

5 MS. MULLIGAN: Your Honor, if I just may. I think
6 this *Brady* issue is particularly significant to defense
7 counsel, and I would like to make a record on this because when
8 we were in court at our clients' arraignment on April 27, I was
9 very happy to hear the magistrate put an order on the record
10 advising the government of what their *Brady* obligations were.

11 THE COURT: Yes, it's an order in every case.

12 MS. MULLIGAN: And that order, your Honor, is in my
13 hand and I'm happy to hand it up to the Court.

14 THE COURT: Yes, it's in every case, Ms. Mulligan.

15 MS. MULLIGAN: But the order clearly says, your Honor,
16 that for purposes of this order, the government has an
17 affirmative obligation to seek all information subject to
18 disclosure under this order from all current or former federal,
19 state, sand local prosecutors, law enforcement officers and
20 other offices who have participated in the prosecution or
21 investigation that led to the prosecution of the offenses with
22 which the defendant has charged.

23 Reading this order, your Honor, which is very clear --
24 and again, the term "or" is used, and we all know as lawyers
25 what that means. The investigation is included. Reading this

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1 order in light of *United States v. Gupta*, your Honor, they're
2 under an obligation to search the records and the notes from
3 the interviews were the SEC and CFTC was present. That is not
4 a burden. That helps the integrity of the entire system, your
5 Honor.

6 THE COURT: The cases are to the contrary, and there
7 is no joint or association in the investigation. The SEC was
8 present at whatever interviews there were, some of them anyhow
9 for the purposes of its own investigation and not to help the
10 prosecution. Motion's denied.

11 The last motion I think is the motion of prosecutorial
12 misconduct, and I I'll hear you, Mr. Lustberg.

13 MR. LUSTBERG: Thank you, your Honor. I want to start
14 by talking about the limited relief that we're seeking with
15 regard to this motion right now, and that is the relief we're
16 seeking is a hearing. I hope that was very clear from our
17 reply brief. Let's be clear what the concern is here. I've
18 been a defense attorney for almost 40 years, and maybe that
19 means I should have been wearier of the government's conduct
20 here. But to the contrary I, like the Court and indeed like
21 our entire system of justice, depend upon prosecutors given the
22 tremendous power that they wheeled to do the right thing, to
23 turn square corners, to seek justice, to be candid.

24 This is embodied in doctrines like *Brady*, and in many
25 places in the criminal law where prosecutors are required to

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1 tell the truth. We argue in our motion that that did not occur
2 in two ways. First, the government told us -- and this is
3 undisputed -- that our client was a subject of the
4 investigation. They never corrected that record to tell us
5 when he became a target. I don't know when he became a target,
6 but I can tell you -- and I don't think that they disagree that
7 they never used the words "Now he's a target." They say that
8 they point to places where they say he was a concern. They
9 talked about how they wanted to get his passport. There's
10 other facts, but they never told us that. And that's okay.
11 They don't have to tell us that.

12 But when they're continuing at the same time to
13 interact with us, to ask us specific questions, to request that
14 we make presentations on particular subjects, then it's a
15 different thing.

16 And that leads to the second concern that we have.
17 The second concern that we have -- and I've never seen this
18 before ever is that we continued to interact with them in good
19 faith. We continued to make presentations. We produced our
20 client for interviews, and we did that because they purported
21 to have an open mind. There's a lot of evidence, your Honor,
22 that they didn't have an open mind. And we've tried to muster
23 that proof for the Court so you can see that this is a
24 colorable claim. But, I will admit that we don't know the
25 point at which their mind was closed. I can tell you that on

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1 the last day -- I'll wait till they finish consulting.

2 That on the last day when we went in and made a
3 presentation specifically directed to answering questions that
4 they posed as to Mr. Hwang's intent, a particularly important
5 and difficult piece of factual information for them to gather,
6 that within hours -- and we don't know exactly when, but within
7 hours of the conclusion of that meeting Mr. Hwang was indicted.

8 Look, if they had told me he was a target, that would
9 have been good information for me to have and I might have
10 behaved differently. But I can tell you that if they told us
11 that he was going to be indicted that afternoon, we would not
12 have provided all the information that we did. Now their
13 argument is, we didn't know until then. But, your Honor, I
14 think that that is a disputed fact. And what I'm asking the
15 Court to do is to hold an evidentiary hearing where we can
16 explore that, where we can find out when they made that
17 decision. There are indicia that it was made before.

18 We know, for example -- and maybe they didn't do this,
19 but under the department of justice's manual in order to bring
20 Rico charges, they had to get permission from Washington. We
21 know that they booked grand jury time for that day. I don't
22 know whether they knew at that time that they were going to
23 indict him. But if they knew that, just a matter of common
24 decency, of candor, of honesty would have encouraged them to
25 tell us where they were.

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1 What happened here, your Honor, was implicit, was an
2 implicit false statement by the government, and many ways
3 explicit. Because at the conclusion of that meeting on the day
4 that Mr. Hwang got indicted, the government raised a question
5 with us. It had to do with the issue that Mr. Valen raised a
6 little while ago about the 2013 investigation of Mr. Hwang.
7 And we said, we'll get you more information on it. And we
8 communicated with them as we were walking out the door, and we
9 communicated that with them on the next day.

10 And what occurred was that by that next day, we didn't
11 know this because it was sealed and Mr. Hwang was arrested the
12 next day, they had already indicted him. Your Honor, it's just
13 not turning square corners. It's just not candid. However,
14 maybe I'm wrong. Maybe the truth of the matter is that this
15 Court after listening to this will conclude that
16 notwithstanding all that, that they had an open mind an hour
17 before they indicted our client. Maybe that's what the Court
18 will conclude. But I think the Court in order to decide this
19 very serious issue, and I can tell you I really hesitate to
20 bring these sorts of allegations. We had extremely
21 professional ongoing communication with the government
22 throughout this process. It was something that I was proud of.
23 I was proud of the presentations we made. I was proud that we
24 made our client available or speak to them, all of which turned
25 on my clear understanding that they were listening. That they

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1 were considering our arguments.

2 I think the record would show that they weren't, and
3 that what they were doing was deceiving us. And we would
4 like -- we respectfully request that the Court -- and it can do
5 this in-camera. It can do this in open court. It can do this
6 under seal if there's confidential information, gather the
7 appropriate facts so that it can make that determination,
8 because this is not how a system of justice, your Honor is
9 suppose to work.

10 Our assistant U.S. Attorneys and U.S. Attorneys in
11 this country have particular obligations to be truthful. And
12 I'm disappointed to say, I don't think that was the case here,
13 but I could be wrong. And if I'm wrong, the Court should
14 hold -- the Court should hold a hearing to decide whether I'm
15 wrong. I can't imagine that the government would oppose the
16 opportunity to set forth why the facts are not what they seem
17 to be, which is that their minds were made up even as they were
18 eliciting information. But I think that the Court should in an
19 exercise of its obligation to make sure that our system of
20 justice is fair should require that type of showing in much
21 more detail than has occurred here.

22 What's occurred so far here is very vague, conclusory
23 affidavits that don't address the facts that we say
24 circumstantially show that they made up their mind even as they
25 elicited information from us. Let me say just two other things

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1 quickly. Your Honor, our position is not that the government
2 ever has to tell our client whether he's a witness, subject or
3 target. I have many cases where prosecutors refuse to give me
4 that information. Most times they do, but they're cases where
5 they don't. But what I'm saying is that when they tell us
6 something, that it has to be true. The representatives of our
7 government who are trying to put my clients in jail have to
8 tell us the truth. That's what this application respectfully is
9 all about. And truth can be not told in two different ways.
10 There can be affirmative lies, or there can be failures to
11 correct known misimpressions.

12 THE COURT: Before you had the first proffer, who
13 suggested the idea of a proffer?

14 MR. LUSTBERG: We did. I'll take responsibility for
15 that. I'm not sure whether that's true, but I'll say that for
16 purposes of this record, we wanted to open up a dialogue with
17 them. And that dialogue --

18 THE COURT: That's not uncommon.

19 MR. LUSTBERG: No. Let me tell you, this was
20 extensive, your Honor. We made a presentation to them.

21 THE COURT: If Mr. Hwang was not going to be the
22 subject or object of prosecution or investigation, who was?

23 MR. LUSTBERG: Well, so just for example --

24 THE COURT: Here's a heavy investigation by the
25 prosecutor of Mr. Hwang's company. So it's either a company or

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1 Mr. Hwang who's going to be the defendant if a case is brought.

2 MR. LUSTBERG: Your Honor, just so you're aware, there
3 are two co-defendants here who have pled guilty. With respect
4 to at least one of them, the allegations have to do with
5 statements that were made to the counterparties. There is a
6 disputed fact in this case as to whether Mr. Hwang had anything
7 to do with those statements. Our position -- and we think the
8 record will show at a trial, and what we argued to the
9 government -- was that he had nothing whatsoever to do with
10 those statements. Those were made by Mr. Becker.

11 THE COURT: It's not uncommon in complicated cases
12 like this, particularly in SEC type cases to have submissions
13 made and beyond in order to dissuade the government from
14 bringing a prosecution.

15 MR. LUSTBERG: 100 percent that's correct.

16 THE COURT: Let me hear from Mr. Thomas.

17 MR. LUSTBERG: Let me just say one last thing which
18 is, I also don't think that the government has an obligation to
19 tell us our client is being indicted --

20 THE COURT: You made the point. Once they say, it's
21 got to be true.

22 MR. LUSTBERG: But if they're not going to tell, then
23 it's not just that. They're doing that while they're
24 continuing a dialogue that results in our providing information
25 to them.

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1 THE COURT: I heard you. Mr. Thomas.

2 MR. THOMAS: Thank you, your Honor. The most
3 outrageous thing about this circumstance is the defense motion
4 itself. Throughout --

5 THE COURT: Let's not worry about outrageous. Just
6 respond to the point.

7 MR. THOMAS: The first and absolutely determinative
8 point is the Supreme Court's decision in the *Bank of Nova*
9 *Scotia* case which makes it clear that accusations of misconduct
10 cannot be the basis for the dismissal of an indictment, unless
11 the misconduct supposedly goes to the impairment of the grand
12 jury process itself. And I'm surprised to hear Mr. Lustberg
13 say that the relief they want is merely a hearing, because as
14 the Court will observe from the cover page of its motion, the
15 defense moved to dismiss the indictment, which is not relief
16 that this Court can lawfully provide.

17 Mr. Lustberg in the reply concedes that at no point
18 did the government impair the grand jury process which
19 basically ends the claim. And they further concede --

20 THE COURT: Can I feasibly have a hearing in this
21 case?

22 MR. THOMAS: Not on this issue, your Honor.

23 THE COURT: Everything that would be subject of
24 inquiry would be privileged.

25 MR. THOMAS: Your Honor, that's absolutely true. But

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1 it's also true that there's nothing that the outcome of a
2 hearing would do that would entitle Mr. Lustberg to relief
3 under the law.

4 THE COURT: Mr. Lustberg knows very well how to
5 protect his client if he wants that protection. I think it's
6 the calculation of the benefits and the burdens of going in and
7 talking with a prosecutor. And whatever the prosecutor says in
8 that regard is always subject to a change of mind or a change
9 of view. Since we're dealing with issues of intent, there's a
10 possibility of persuasiveness up to the last minute. Motion is
11 denied. All right. Where do we go from here?

12 MR. THOMAS: Your Honor, we're scheduled for trial now
13 at beginning of January 2024, and the parties have been
14 conferring about a potential agreeable pretrial schedule for
15 the filing of various notices and pretrial motions. If we can
16 hash that out, we'll submit a proposal to the Court.

17 THE COURT: Are you going to be using experts?

18 MR. THOMAS: We expect that we will, and the schedule
19 that we're discussing would contemplate deadlines by which each
20 side would file expert reports and submit any associated
21 briefing.

22 THE COURT: Where are you in your discussions?

23 MR. LUSTBERG: I can answer that. The government made
24 a proposal with regard to certain dates working backwards from
25 the trial date. We accepted parts of that, and we ask them to

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1 reconsider other parts. I believe we had a meet and confer,
2 counsel can correct me if I have the timing wrong, a few weeks
3 ago, and we have not heard back on their response to our
4 proposed changes to the schedule. We're happy to continue to
5 meet and confer and come up with a schedule if we can. And if
6 we can't agree, we'll bring those to the Court.

7 THE COURT: Have I set a final pretrial conference
8 date?

9 MR. THOMAS: I believe that you have. You did for the
10 first trial date. Let me just look at the docket to see if you
11 did.

12 THE COURT: Cause I can see this as a process.

13 MR. THOMAS: Yes, and the proposal advanced by the
14 government would have expert disclosures due more than two
15 months in advance of trial, and the defense has proposed even
16 earlier than that. All parties agree that we want to give the
17 Court time to deal with the expert issue among the other issues
18 well in advance of trial.

19 THE COURT: We have a *Daubert* hearing here or a
20 *Daubert* motion.

21 MR. LUSTBERG: Yes, your Honor.

22 THE COURT: This is a complicated case, folks. It's a
23 complicated case. I believe in disclosure. There should be an
24 absence of surprise at trial. It's going to be a difficult
25 enough trial to deal with not to be burdened by side issues

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1 that could have been ventilated beforehand. My rulings will be
2 bias in favor of disclosure. You should know that.

3 MR. THOMAS: Yes, your Honor.

4 THE COURT: And early rulings as well. Both of you
5 have a lot of technical difficulties to deal with. The
6 government in terms of ordering its proof and keeping the
7 attention of a jury in a long and complicated case. And the
8 defense in just knowing what's the best thing to do with their
9 clients, and they need time. Both sides need time to work this
10 out. And perhaps two final pretrial conference dates. One
11 early to rule on motions *in limine* and *Daubert* and that sort of
12 thing, and the next one is necessary to be a bar date for the
13 production of all -- the word escapes me. Not *Brady*.

14 MR. THOMAS: 3500 and *Giglio* material.

15 THE COURT: Not particularly witness material. What's
16 the Supreme Court case?

17 MR. LUSTBERG: Maybe *Jencks* or *Giglio*.

18 THE COURT: *Giglio* material. I'll be at your
19 disposal. Let me block it out as early as I can.

20 MR. THOMAS: Thank you, your Honor. I think we
21 probably all collectively share your aims.

22 THE COURT: Final pretrial conference date is January
23 3. We should keep it close to trial, see if there's any
24 lingering problems, but we need a date in December to argue
25 everything out.

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1 MR. THOMAS: Yes, your Honor. We'll confer with the
2 defense and propose a schedule including a date for motion
3 conference.

4 THE COURT: And call Bridgette and work it out.

5 MR. THOMAS: Yes, your Honor.

6 THE COURT: Is there anything else I can do today?

7 MR. THOMAS: Not from the government, your Honor.

8 THE COURT: Mr. Lustberg?

9 MR. LUSTBERG: No, your Honor.

10 THE COURT: Ms. Mulligan?

11 MS. MULLIGAN: No, your Honor. Thank you.

12 THE COURT: Thank you all.

13 (Adjourned)
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